Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 2003

LORI CASS,

Petitioner,

-VS.-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the New York State Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioner's attorney who also represented her husband, an unindicted co-conspirator and co-defendant corporations, labored under a conflict of interest in violation of the Sixth Amendment ?

2. Whether petitioner established that her counsel's alleged conflict of interest adversely affected his performance?

3. Whether petitioner knowingly, voluntarily and with the advice of counsel entered a plea of guilty and waived her right to appeal?

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STATUTES

28 USC §1257(a)

The Petitioner, Lori Cass, by and through her appointed counsel of record, Lenard Leeds, respectfully prays that a writ of certiorari issue to review the judgment of the New York State Court of Appeals entered on the 19th day of October 2003.

BRIEF FOR PETITIONER

I. QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioner's attorney, who also represented her husband, an unindicted co-conspirator and co-defendant corporations, labored under a conflict of interest in violation of the Sixth Amendment?

2. Whether petitioner established that her counsel's alleged conflict of interest adversely affected his performance?

3. Whether petitioner knowingly, voluntarily and with the advice of counsel entered a plea of guilty and waived her right to appeal?

II. OPINION BELOW

Petitioner's application to the Court of Appeal for leave to appeal was denied

III. JURISDICTION

The New York State Court of Appeals denied leave on October 20, 2003. The jurisdiction of this Court is invoked under 28 USC § 1257(a).

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The sixth (6th) amendment of the United States Constitution.

V. STATEMENT OF THE CASE

Petitioner, Ms. Lori Cass was a clerk in an appliance repair business operated by her husband, Douglas Cass. Lori Cass, was arrested on March 15, 2001 and charged with one count of Scheme to Defraud in the First Degree, a class "E" felony, as well as one count of Resisting Arrest. Petitioner retained Mr. Gary Gramer of Gramer and Associates to represent her regarding these charges. Mr. Cass is the owner of a number of corporate entities regarding the appliance repair business that were also charged criminally. Mr. Gramer also represented these corporate defendants.

The record before the trial Court evidenced the fact that Mr. Gramer has represented Petitioner's husband, Douglas Cass, for the past 20 years, with respect to civil and criminal litigation and Consumer Affairs complaints. Immediately prior to petitioner's arrest on the aforementioned charges in this case, Mr. Gramer represented Douglas Cass on charges of performing home appliance repairs without a license. Mr. Cass' criminal charges involved the same corporate defendants, as those in Mrs. Cass' case. The People dismissed the charges against Mr. Cass the day before Lori Cass' arrest. To date, Gramer continues to represent Mr. Cass on related cases and was representing Mr. Cass throughout Petitioner's trial.

The criminal case against Mrs. Cass and the corporate defendants proceeded to trial in late March 2002. During the pre-trial hearings, the trial court was informed of Mr. Gramers representation of Douglas Cass and Active Appliance Corp. one of the corporate defendants, in prior criminal cases. The Court went so far as to state that a Gomberg conflict inquiry may be necessary, but failed to conduct the requisite examination as to whether any (1) potential conflicts of interest existed, (2) whether appellant Lori Cass was aware of the conflict and (3) the potential risks involved in having Mr. Gramer

represent her in the case at bar. (Trial Transcript pp 28-30, attached as Exhibit A). The Court made a brief statement about potential conflicts regarding Mr. Gramer's representation of Lori Cass and the corporate defendants as co-defendants, making inquiry as to whether a severance motion had been made. (TT pp. 29-30) Other than this passing comment by the Court, the Court failed to undertake any inquiry of the conflict and thus failed to advise Mrs. Cass about the conflict and the ramifications that could result from such conflict.

In a post-trial affidavit, that was part of the appellate record, Petitioner indicated that Mr. Gramer told her that the consequences for her husband would be "worse if [he] were prosecuted [and convicted] because he was a prior felony offender, having been convicted of Felony Driving While Intoxicated. (Cass Affidavit, Exhibit B).

Further evidence of a potential conflict arose when it was revealed that Mr. Gramer was indebted to Douglas Cass. During the People's investigation of this case, they uncovered evidence that potentially $850,000 in loans were given to Mr. Gramer by Douglas Cass. There was also evidence that Mr. Gramer, received $200,000 from Douglas Cass when he issued a mortgage note in return for this amount. (Gramer Affirmation, Exhibit C). In fact, this loan remained unpaid and unsatisfied before Lori Cass' trial, during her trial, and after appellants' pleas were taken.

Prior to her plea, the Court outlined the plea agreement on the record. The plea involved a felony conviction and a six month period of incarceration followed by a period of probation. The Court never mentioned that Mrs. Cass would have to waive her right to appeal as a condition of the plea. (TT pp 951 - 957). Moreover, Mr. Gramer never advised Mrs. Cass that she would have to waive her right to appeal, because such waiver was never bargained for in the previous plea dis-

cussions with the Assistant District Attorney. The court introduced the waiver, *sua sponte,* for the first time during petitioner's allocution.

Petitioner subsequently fired Mr. Gramer as her attorney and hired new counsel to file a motion to withdraw her guilty plea, and the pleas of the corporate defendants on the grounds that the guilty pleas were involuntary as a result of 1) Gramer's conflicts of interest; 2) coercion and inducement by defense counsel, the People and the court; 3) breach of the plea agreement by the People; and 4) the lack of competency and experience of defense counsel, resulting in ineffective assistance of counsel.

Procedurally, the Trial Court denied appellants motion to withdraw their guilty pleas in its entirety. (Exhibit D). In its decision regarding the Petitioner's conflict of interest arguments, the Court does not address its failure to conduct any Gomberg inquiry, on the record or otherwise, as to whether a conflict existed, whether Lori Cass was advised of the conflict or the possibility thereof, the risks and consequences involved with proceeding with conflict-impaired counsel, and whether she knowingly and voluntarily chose to proceed with Gramer despite her awareness of the aforementioned risks.

The matter was appealed to the Appellate Division - Second Department, wherein the Appellate Division denied the appeal (Exhibit E). Petitioner's subsequent application to the Court of Appeals for leave to appeal was denied. (Exhibit F).

VI. REASONS FOR GRANTING THE WRIT

The Right to Counsel guaranteed by the Sixth Amendment includes the " right to representation that is free from

conflicts of interest." Wood v. Georgia, 450 U.S. 261, 271, 101 S.Ct. 1097, 1103, 67 L.Ed.2d 220 (1981) (citing Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980) and Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978)); US v. Levy, 25 F3rd 146.

The Counsel Clause of the Sixth Amendment provides that a criminal defendant "shall enjoy the right ... to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. This right to counsel is not just the right to have an attorney present, but "the right to effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). The Supreme Court has explained that to give meaning to the requirement for effective assistance of counsel, it is necessary to be guided by the purpose behind the Sixth Amendment, "to ensure a fair trial." Therefore, the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process, that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The New York State Court of Appeals has held further that "a defendant will prevail on a claim of ineffective assistance of counsel, thus warranting reversal, as long as the conduct of the [the] defense was in fact affected by the operation of the conflict of interest, or that the conflict operated on the representation." People v. Ortiz 76 N.Y.2d 652, 657 (1990).

In Ortiz, the Court of Appeals addresses the issue of multiple representations constituting a conflict of interest, even though such representations may not be simultaneous:

> Even though a representation has ended, a lawyer has continu-

> ing professional obligations to a former client, including the duty to maintain that client's confidences and secrets, which may potentially create a conflict between the former client and the present client. Such a conflict is called a potential not because the client' conceivable interests are less than completely adverse, but because – the former representation having ended - - the conflict may never actually arise during the existing attorney-client relationship.

76 N.Y.2d at 656.

In the case at bar, Gramer's continuing professional obligations to Douglas Cass prevented him from effectively representing Lori Cass. When faced with the prospect of Douglas Cass taking the stand and being subjected to impeachment based upon the prior criminal convictions and bad acts directly related to Douglas Cass' business and the operations of the corporate defendants, Gramer chose to delete Douglas Cass from the witness list and not call him to the stand. The issue presented Gramer with an actual conflict: whether to call his lifelong client Douglas Cass to the stand as the person who could exonerate his present client, Lori Cass or to protect Douglas Cass. When faced with an actual conflict as opposed to a potential conflict, the conflict itself, by its very nature impairs the representation and renders it ineffective. The conflict in the case at bar is actual and Gramer took steps in the defense of Lori Cass that evidence the conflict.

In her post-trial affidavit, Petitioner indicates that Gramer was further conflicted due to his concerns regarding Mr. Cass' status as a predicate felon and that should the People

seek to prosecute Mr. Cass the penalty would be far greater if he were found guilty. These are not the comments of an unconflicted attorney. Mr. Cass' prior felony conviction should not have interfered with the operation of Mrs. Cass' defense.

Similarly, in US. v. Levy, the Second Circuit, reiterated the analysis to use when faced with an actual versus potential conflict. 25 F.3d 146, 155 (2nd Cir. 1994) The Levy Court, citing from Strickland v. Washington, states, "if a defendant establishes that her attorney has a potential conflict of interest, in order to prove that the conflict resulted in a violation of her Sixth Amendment right to effective assistance of counsel, she must demonstrate prejudice. However, prejudice is presumed when a defendant establishes that her attorney had an actual conflict of interest that adversely affected the attorney's performance."

Under New York Law, if the conflict is deemed potential then Petitioner is required to merely demonstrate that " the potential conflict affected, operated on, or borne a substantial relation to the conduct of the defense". There is also no requirement that Petitioner (ie: Defendant) prove or show specific prejudice as a result of the conflict. People v. Ortiz 76 N.Y.2d 652, 657 (1990). In the instant case Petitioner's trial counsel, Gramer, attempted to represent her while simultaneously working to protect her husband and the corporate defendants. His actions seriously undermined her defense, creating a conflict of interest that left her with flawed representation, such that her plea of guilty should be vacated.

Under New York law the Trial Court owes a duty, independent of counsel "to protect the right of the accused to effective assistance of counsel." People v McDonald 68 N.Y.2d 1, 8 (1986). Once it appears that conflicting interests arguably exist, the Trial Judge must conduct a record inquiry, of each defendant whose representation is potentially conflict-

ridden, in order to ascertain whether he or she "has an awareness of the potential risks involved in that course and has knowingly chosen it." McDonald at 8, citing People v. Gomberg , 38 NY2d 307 (1975). This Court has applied a similar rule be applied in Federal Courts, holding that when a possible conflict has been entirely ignored, reversal is automatic. Cuyler 446 U.S. at 347, 100 S.Ct. at 17-18; Holloway, 435 U.S. at 488, 98 S.Ct. at 1180-81.

In the case at bar, the Trial Court was presented with ample evidence throughout the course of the case that a conflict existed. Prior to the commencement of the trial, it was common knowledge amongst the Court and Counsel that Douglas Cass, the Petitioner's husband was the main actor in prior criminal convictions involving the corporate defendants. As stated above, the Court was made aware during the Sandoval hearing that prior convictions that the People sought to introduce, were convictions where Douglas Cass was operating in the corporate form, not Lori Cass. People v. Sandoval 34 NY2d 371, 314 N.E. 2d 413 (1974)

Moreover, as mentioned earlier, the trial court specifically identified a potential Gomberg conflict, yet failed to address it further. The colloquy was as follows:

> The Court: I need clarification on your argument. Are you alleging Lori Cass is a defendant only for the purpose of the letter C of the indictment, against her individually ? Or are you also arguing that she is a defendant or a fact witness with respect to Active Appliance and Reliance Appliance which may then lead us into additional Gomberg conflict issues,[emphasis added] which is what I'm trying to get to?.
>
> Mr. Saladino: Your Honor, I have to take the position

that she may be a fact witness as to the other corporations. The other defendant corporations. So any attack on her credibility would vis-a-vis flow through to the defendant corporations.

The Court: Okay. There's been no application for severance of these matters; is that correct?

Mr. Saladino: Not by me, your Honor.

The Court: Anything else for the record on this issue, Mr. Gramer?

Mr. Gramer: We would have, your Honor, as to these issues, we would have no objection to severance.

The Court: I asked if there was any affirmative application. The date of the trial is a little late to make that application.

Mr. Gramer: I understand that. We have no objection to severance of this case.

Trial Transcript 29 - 30

Thus, prior to the trial, it can be argued that the Court was aware or reasonably should have been aware of the potential conflicts that existed with respect to Gramer's representation of Lori Cass. Yet the Court chose to ignore the conflict and move forward. Even in the absence of an inquiry by the Court, the conflict is readily apparent and impacted Gramer's actions, to the detriment of Lori Cass. Moreover, based upon the statement made by Gramer that "we would have no objection to severance," it is apparent that Gramer quite possibly

realized for the first time that there was something untoward with his multiple representation of Mr. & Mrs. Cass and the corporate defendants.

Whenever the court's inquiry reveals that a criminal defendant's attorney in fact suffers from an actual or potential conflict, the court has a subsequent "disqualification/waiver" obligation. Had the Trial Court in the case at bar engaged in this inquiry it would have easily uncovered facts that would have mandated the removal of Gramer as Petitioner's counsel. In the alternative the Court could have inquired of Petitioner whether she was aware of the conflict and whether she wished to continue with Gramer.

VII. CONCLUSION

Petitioner's right to effective, unconflicted counsel under the Sixth Amendment was violated in this case. Mr. Gramer, placed himself in a position where he was attempting to service the needs of one client, Lori Cass, while at the same time trying to protect Douglas Cass and the Corporate Defendants. A criminal attorney can have but one master. Gramer admittedly, failed to recognize the conflict and his error was compounded by the People's failure to notify the Court of the conflict and the Court's failure to conduct an inquiry into Petitioners knowledge of the conflict.

Respectfully Submitted,

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APPENDIX A
RELEVANT PORTIONS OF TRIAL TRANSCRIPT

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Peo. v. Active Appliance, Reliance Appliance & Lori Cass should be allowed to inquire on cross-examination should she elect to testify?

MR. SALADINO: Your Honor, cross-examination of a witness with regard to prior convictions, whether they're crimes or offenses

THE COURT: Let's differentiate between a defendant and a witness and nondefendant witness. I think the theory of your case, obviously she's a defendant for the individual charges against her as an individual under letter C of the indictment.

MR. SALADINO: Yes.

THE COURT: You've also represented on the record she is either an officer, director or high managerial agent of both Active and Reliance Appliance Corporation. And you need to address yourself to that.

MR. SALADINO: As an individual, your Honor, and a defendant, personal defendant in this case, I would only seek to -- well, withdrawn. As the defendant in this case, Lori Cass, your Honor, I wish to confront her on this. It

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shows a willingness on her behalf to place her interests before those of society by breaking the law. And that, your Honor, would go to her credibility. That would be an innate dishonesty which should be uncovered on cross-examination.

THE COURT: I need a clarification on your argument. Are you alleging Lori Cass is a defendant only for the purposes of the letter C of the indictment, against her individually? Or are you also arguing that she is a defendant or a fact witness with respect to Active Appliance and Reliance Appliance which may then lead us into additional Gomberg conflict issues, which is what I'm trying to get to?

MR. SALADINO: Your Honor, I have to take the position that she may be a fact witness as to the other corporations. The other defendant corporations. So any attack on her credibility would vis-a-vis flow through to the defendant corporations.

THE COURT: Okay. There's been no application for severance of these matters; is that correct?

MR. SALADINO: Not by me, your Honor.

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THE COURT: Anything else for the record on this issue, Mr. Gramer?

MR. GRAMER: We would have, your Honor, as to these issues, we would have no objection to severance.

THE COURT: I asked if there was any affirmative application. The date of trial is a little late to make that application.

MR. GRAMER: I understand that. We have no objection to severance of this case. I would like to affirmatively state to the court with regard to items one and two of the Sandoval notice, I will be endeavoring over lunch to have an investigator go to the District Court in Central Islip

and obtain Certificates of Conviction for the two alleged convictions by --before Judge Kahn and before Judge Lotto.

THE COURT: All right. I think we've discussed the Sandoval issues sufficiently.

MR. SALADINO: May I be heard with regard to one more matter, your Honor?

THE COURT: On Sandoval? MR. SALADINO: Yes.

THE COURT: Go ahead.

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THE COURT: She doesn't get a right to ask a question at this time point. She gets a right to tell me yes or no.

MR. GRAMER: What is your answer?

THE DEFENDANT: Yes, I have to.

THE COURT: Yes or no?

MR. GRAMER: She says yes.

THE COURT: Step up to the rail with your client, Mr. Gramer.

Mr. Saladino, Mr. Gramer, it's my understanding, based on a. conversation with both Mr. Saladino and Mr. Gramer, that on behalf of the two corporations, Active Appliance Corporation and Reliance Appliance, Inc., that by counsel, each of those corporations will be entering pleas of guilty to count four of the indictment, Scheme to Defraud in the First Degree.

In exchange for those guilty pleas, it is my, understanding as to the corporate defendants, that they will be bargained-for fines of $5,000 for each of the corporations, which would be a total of $10,000.

In addition, as to the individual

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in exchange for her plea of guilty to count four, Scheme to Defraud in the First Degree, it would be a bargained-for disposition of a definite period of incarceration of six months in the Suffolk County correctional facility; in addition, five years probation supervision supervised by the Suffolk County Department of Probation; and a bargained for forfeiture with respect to this of $100,000 payable prior to sentence.

Is that an accurate and complete understanding of the agreement that you've reached with Mr. Gramer, Mr. Saladino?

MR. SALADINO: It is, your Honor.

THE COURT: Mr. Gramer, do you wish to add anything to that, sir, or is that a fair summary of the understanding?

MR. GRAMER: It is a fair summary.

THE COURT: With respect to this, Miss Cass

May I inquire of your individual client, Mr. Gramer?

MR. GRAMER: Yes, sir.

THE COURT: Miss Cass, it's my

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understanding, ma'am, you're going to withdraw your prior plea of not guilty, and enter in its place instead a plea of guilty to the crime of Scheme to Defraud in the First Degree pursuant to Section 190.65 of the Penal Law of the State of New York as contained in count four of Indictment 1928-C of 2001.

Is that what you've agreed to do at this point, ma'am?

THE DEFENDANT: Yes.

THE COURT: Have you had enough time to discuss this matter with your attorney?

THE DEFENDANT: Yes.

THE COURT: Are you and Mr. Gramer in agreement that it is in your best interests to plead guilty to this class E felony today?

THE DEFENDANT: Yes.

THE COURT: Do you understand, ma'am, that the maximum sentence that could be imposed on a class E felony is one and-and-third to four years in a state prison? Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Do you understand that

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for the ten-year period going forward from your release from jail, if you're convicted of any future felony after trial or by entry of a plea of guilty, you face mandatory upstate incarceration on any future felony conviction? Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Other than what I've ,placed on the record, has anyone made any other promises to induce you to plead guilty?

THE DEFENDANT: No.

THE COURT: Has anyone threatened or coerced you into pleading guilty?

THE DEFENDANT: No.

THE COURT: Are you doing this voluntarily at this juncture?

THE DEFENDANT:- Yes.

THE COURT: Do you have any questions for myself, for your attorney before I proceed?

THE DEFENDANT: I just want to know when I have to do this.

THE COURT: With respect to this, ma'am, it is my understanding you have been returning to court. I will hear the district

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attorney on the issue of bail.

I would anticipate that we would be able to have a presentence investigation report done. It would most likely be

What's my out of custody P S I date?

THE CLERK: May 31.

THE COURT: -- on or about May 31, or that first week of June, where you would be sentenced. And at that juncture begin serving a sentence.

Does that answer your question, ma'am?

THE DEFENDANT: Yes.

THE COURT: Do you have any other questions?

THE DEFENDANT: No.

THE COURT: Do you understand that by pleading guilty, you're waiving your right to continue this jury trial? Do you understand that?

THE DEFENDANT: Yes.

THE COURT: You also understand that by pleading guilty, you're waiving your right to have the district attorney prove these cases against you beyond a reasonable doubt?

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THE DEFENDANT: Yes.

THE COURT: Do you understand that by pleading guilty, you're waiving any rights you might have to be represented by counsel, Mr. Gramer or the counsel of your choosing, at trial, and you're also waiving any rights you have to confront, to cross-examine, the witnesses against you at the trial?- Do you understand that?

THE DEFENDANT: Yes.

THE COURT: You also understand that by pleading guilty, you're waiving any rights you have to assert any defense that you might have? You're waiving any rights that you may have to present any evidence in your own defense. You're also waiving your own right to testify at trial if you chose to testify. Do you understand that as well?

THE DEFENDANT: Yes.

THE COURT: Are you under the care of a physician or taking any prescription drugs at this time, Miss Cass?

THE DEFENDANT: No.

THE COURT: Okay. Have you consumed

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any alcoholic beverages or prescription drugs in the past 24 hours which would impair your mental faculties?

THE DEFENDANT: No

THE COURT: Do you understand by pleading guilty with respect to this, the district attorney is requiring that you waive your rights of appeal? Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Any questions with respect to the waiver of your right of appeal?

THE DEFENDANT: No.

THE COURT: Are you waiving your right of appeal knowingly and voluntarily?

THE DEFENDANT: I don't understand that.

THE COURT: Do you have any questions with respect to the waiver of your right of appeal for either myself or for Mr. Gramer at this time?

THE DEFENDANT: No.

THE COURT: Would you like me to explain it? I'll explain it further.

THE DEFENDANT: Yes, please

APPENDIX B

AFFIDAVIT OF LORI CASS SWORN TO JULY 1, 2002

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK PART 8

----------X

AFFIDAVIT

Indictment No.: 1928 - A
1928 – B
1928 - C

PEOPLE OF THE STATE OF NEW YORK

against-

ACTIVE APPLIANCE CORP., RELIANCE APPLIANCE, INC., LORI A. CASS,

Defendants

---------- X

I, Lori Cass, hereby affirms under the penalty of perjury the following:

1. I am not guilty of all charges in the Indictment against me and maintain my innocence and as to culpable conduct alleged in said Indictment.

2. My plea of guilty to the charge of Scheme to Defraud in the Fourth Degree on April 4, 2002, was involuntary.

3. This plea was due to coercion and the lack of competence and ineffective assistance of counsel by my former attorney, Gary Gramer. As a result, I terminated Mr. Gramer as my attorney and retained William J. Keahon to represent me in this motion to withdraw my guilty plea.

4. During the entire period that Gary Gramer, Esq., was my counsel in the above captioned matter, I was completely unaware of potential risks as a result of the conflicts of interest that existed between his representation of my husband, Drew Cass ("Drew"), in prior Consumer Affairs and civil complaint litigation, and his representation in the prosecution of myself in this case.

5. Although I consistently maintained my innocence throughout my prosecution and lack of knowledge concerning the acts alleged in the Indictment, Mr. Gramer repeatedly stated that the consequences for Drew would be worse if Drew were prosecuted because he was a prior felony offender, having been convicted of Felony Driving While Intoxicated.

6. I have recently discovered that I had a meritorious defense and could have asserted this defense if it were not for the aforementioned conflict of interest and Mr. Gramer's coercive effort to protect Drew from prosecution.

7. Being that I was neither an owner, an officer, or a high managerial agent of the corporations in this Indictment, and that Mr. Gramer has represented Drew for the past 20 years in Consumer Affairs complaints and other civil lawsuits on similar issues as in this Indictment, Mr. Gramer refrained from putting any blame on Drew.

8. In addition, it is now my understanding that this type of conflict violated Mr. Gramer's duty to withdraw from either his representation of myself or Drew in pending civil claims against Drew.

9. Also, I have recently discovered the risks that were involved regarding the conflict of interest which existed throughout the duration of Mr. Gramer's representation in this

case. That is, Mr. Gramer, signed and issued a mortgage note to receive $200,000 from Drew which was outstanding at the time he agreed to represent me in my defense. Although my name appears on the note I was unaware of the potential risks involved in such a transaction.

10. I was never advised nor consulted regarding the consequences of these conflicts of interest. Had I been, I would have sought different and competent counsel.

11. I am also seeking to withdraw my guilty because prior to, and at the time of my plea on April 4, 2002, I was never advised, nor understood the consequences of pleading guilty and that by doing so, I would be waiving my right to appeal.

13. In fact, at time of my plea of guilty, on April 4, 2002, I was overwhelmed by the Court and its demand for an answer to the instant plea agreement without being permitted to ask a question to the Court or Mr. Gramer. It is my understanding and belief that the Court took
advantage of Mr. Gramer's lack of experience and competency in felony criminal trial practice and induced Mr. Gramer and myself to accept the plea from which I am seeking to withdraw.

14. Immediately after Mr. Gramer was allowed a mere 30 second sidebar, he told me that I had to plead guilty and demanded that I simply answer all of the Court's questions. In fact, each time the Court posed a question, Mr. Gramer nodded his head to suggest either a yes or no answer and without sufficient understanding of the consequences, I answered accordingly.

15. Notwithstanding that the total amount of loss claimed by complaining witnesses is $14,000, all of whom have been

reimbursed, the District Attorney's Office and the Court have repeatedly increased the amount of restitution and fines to be paid throughout plea negotiations, without justification or proof of additional loss. The amount of restitution under the first plea offer was $28,000; under the second, $47,000; and under the third, a $15, 000 fine and a $100,000 forfeiture.

16. In fact, after my plea the District Attorney Office notified the Court and Mr. Gramer of new complaints, from the time of the Indictment through my plea, for the same conduct as alleged in the Indictment and will file additional charges against me and the corporations seeking additional restitution that was not a part of the original plea agreement.

17. As a result, the District Attorney commenced an ex parte civil forfeiture action against Drew in order to account for these purported losses and Mr. Gramer was counsel for Drew in his attempt to get this levy lifted. In fact, the District Attorney has now executed the levy and is now in possession of $47,000 obtained from Drew's money market account.

18. Therefore, these additional complaints, the civil forfeiture action, and the imminent new criminal charges against me have resulted in the Court being unable to fulfill its promises under the instant plea agreement.

_____

LORI A. CASS

Sworn to before me this 1st day of July, 2002
NOTARY PUBLIC
BARBARA J. KNOLES
Notary Public, State of New York
No. 52-4665172
Qualified in Suffolk County
Commission Expires Nov. 30, 2002

APPENDIX C
AFFIRMATION OF GARY GRAMER, JULY 15, 2002

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK PART 8

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AFFIRMATION
Indictment No.:1928 - A
1928 – B
1928 - C

PEOPLE OF THE STATE OF NEW YORK

against-

ACTIVE APPLIANCE CORP., RELIANCE APPLIANCE, INC., LORI A. CASS,

Defendants

----------X

I, Gary Gramer, duly admitted to practice law in the state of New York affirms under the penalty of perjury the following:

1. I am duly licensed to practice law in the State of New York and maintain the law office, Gramer and Associates, located at 2780 Middle Country Road, Lake Grave, New York, 11755.

2. I was retained as defense counsel to represent Lori Cass, Active Appliance Corp., and Reliance Appliance, Inc. ("Defendants"), under Indictment No. 1928 A-C.

3. Prior to my representation of Defendants in the above captioned matter, the only other Felony criminal trial in which I was defense counsel and which went to verdict was in 1978. My client in that case was convicted and received a sentence

of a 7 1/2 -15 year prison term. However, I have disposed of felony and misdemeanor cases prior to verdict.

4. Notwithstanding my representation of Defendants in their case, I personally practice law in an area that is 90 % civil, involving civil claims and civil litigation.

5. Prior to my representation of Defendant's in the above captioned matter, I represented Drew Cass ("Drew") for the past to 20 years in defending Drew in Consumer Affairs complaints and other civil lawsuit litigation. In fact, I continue to represent Drew in these and other pending civil claims and litigation.

6. Prior to my representation of Defendants, I signed and issued a mortgage note for which I received $200,000 from Drew Cass and Lori Cass, which has been filed as a public record in the County of Suffolk. At the time that I was retained to represent Defendants, this note was outstanding.

7. Throughout my representation in the this case, I did not recognize any conflicts of interest and their consequences to Defendants in the defense of their case.

8. I admit that Lori Cass repeatedly professed her innocence throughout her prosecution in this case.

9. The District Attorney never bargained for an agreement in which Lori Cass would waive any right to appeal the plea or sentence. However, the Court made it a point to make sure that there was such an agreement to waive the right to appeal.

10. Additionally, the Court initiated plea agreements in an off the record conference in chambers. Here, I admit that I was overwhelmed by the Court's stern recommendation that

Lori Cass accept the plea and subsequently instructed Lori Cass that she had to plead guilty.

11. Upon returning from chambers, and a mere 30 second sidebar, it was apparent that Lori Cass did not know what was happening as to whether she was taking the plea and wanted to ask a question of the Court. However, when the Court denied her request I told the Court that she was pleading guilty without having advised her of the consequences of waiving her right to appeal because it was never discussed or bargained for with the District Attorney in chambers or otherwise. The Court added this waiver during its questioning of Lori Cass at the time of her allocution, and feeling pressured, I failed to object. Also, when it was clear that Lori Cass did not understand the consequences of such a waiver, and after the Court tried to explain, I erroneously instructed Lori Cass to give an affirmative answer.

12. In fact, during her entire allocution, Lori Cass looked to me when the Court was questioning her as an indication that she did not know how she should respond. Therefore, I simply nodded my head in the direction that suggested the answers I wanted her to give.

13. Since her plea, the District Attorney's Office has been corresponding with the Court and myself in regard to additional complaints from the time of the Indictment through Defendants' pleas which were not incorporated into the plea entered by Defendants.

14. The position of the District Attorney's Office is that it wants the corporations in the case at bar to resolve these new complaints by pleading guilty to Scheme to Defraud in the First Degree, a Class E Felony, and pay full restitution prior

to sentencing to satisfy these new complaints in the amount of $21,356.12.

15. Through my subsequent conversations with the District Attorney, it was pressed upon me that if the corporations did not plead to the new felony charge and pay the additional restitution prior to sentencing, Lori Cass would be indicted as a predicate felon.

16. Being that Lori Cass was scheduled to be sentenced on June 5, 2002, and the last letter from the District Attorney, dated May 30, 2002, required the additional felony plea and payment of additional restitution, I could not effectively advise Lori Cass as to what options were available to her.

17. Furthermore, the District Attorney, in this May 30th letter, stated that on this date there were two more new complaints received for which the additional restitution to be paid prior to sentencing did not include.

18. As a result of these latest demands by the District Attorney's Office and my inexperience, Lori Cass sought new counsel to effectively advise her on how to proceed on the date of her sentencing. She has since terminated myself as her attorney and retained William J. Keahon, P.C., to whom I am giving this affirmation in support of Defendant's motion to withdraw their guilty pleas.

Dated: June 28, 2002
Islandia, New York

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GARY GRAMER, ESQ.

APPENDIX D
DECISION OF SUFFOLK COUNTY CRIMINAL COURT DATED JULY 15, 2002

STATE OF NEW YORK
COUNTY COURT - SUFFOLK COUNTY
CRIMINAL TERM, PART 8

Ind. Nos. 1928A, 1928B & 1928C-01
By: HON. JOSEPH FARNETI
J.C.C

THE PEOPLE OF THE STATE OF NEW YORK

-vs

ACTIVE APPLIANCE CORP., RELIANCE APPLIANCE, INC.
LORI CASS

Defendants

HON. THOMAS J. SPOTA Suffolk County District Attorney
By: A.D.A., Maureen A. McCormack, Esq.
North County Complex- Bldg. 77 Veteran's Memorial Highway
Hauppauge, New York 11788

Attorney for Defendants
William J. Keahon, Esq.
One Suffolk Square
Islandia, New York 11749

Upon the following papers numbered 1 to 34, submitted July 15, 2002, read on this motion for an order of this Court,

Notice of Motion and supporting papers 1-14

By joint motion submitted to this Court, through counsel, on the 15th day of July, 2002, the defendants seek an order of the Court pursuant to CPL §220.60 permitting the defendants to withdraw their plea of guilty entered on the 4th day of April, 2002, to wit: one count of Scheme to Defraud First degree (P.L. § 190.65).

The Court in its discretion, prior to the imposition of sentence, may permit a defendant who has entered a plea of guilty to part of an indictment to withdraw such plea and restore the entire indictment as it existed at the time of the plea (see, CPL §220.60(3)). In making such a motion to the Court the defendant holds the burden of establishing grounds which justify withdrawal of the plea (see, People v. Sanchez, 75 A.D.2d 918, 427 N.Y.S.2d 538 (1980)).

As a basis for the instant application the defendants argue:

1) Potential risks of a conflict of interest existing between Gary Gramer's representation of the defendants and Gary Gramer's prior representation of Douglas Cass (husband of defendant Lori Cass);

2) Defendant's guilty pleas were involuntary as a result of undisclosed risks of conflicts and coercion and inducement to plead guilty by defense counsel, the District Attorney and the Court;

3) The breach of the plea agreement by the District Attorney's Office and the Court's inability to carry out the proposed agreement; and

4) Lack of competency and experience of defense counsel to effectively assist the defendants.

Gary Gramer, counsel to the defendants prior to and during the trial, had a previous and existing relationship with Douglas Cass, the husband of defendant Lori Cass. Mr. Gramer has previously and continues to represent Douglas Cass on unrelated civil matters for over twenty years. Mr. Gramer also had a prior mortgage note which he signed and issued to Douglas and Lori Cass for which Mr. Gramer received $200,000. Counsel now argues that Mr. Gramer's prior and continuing relationship as well as the mortgage note caused a conflict of interest with the defendants leading to the ineffective assistance of counsel.

The Court notes that Douglas Cass is not a co-defendant in the instant matter. The Court further notes that Mr. Gramer's representation of Douglas Cass regards matters unrelated to the instant matter. Counsel's representation of Douglas Cass was not hidden from the defendants the People or the Court. Upon inquiry of the Court, prior to trial, both the People and defense counsel indicated that they would not be calling Douglass Cass as a witness on direct or as rebuttal. Mr. Gramer further insisted that Douglas Cass would be his trial assistant throughout the proceedings. [Hearing Transcript p.133] Accordingly, the Court finds counsel's reliance upon People v. Gomberg and People v. McDonald to be misplaced. 379 NYS2d (1975); 505 NYS2d 824 (1986) Accordingly, it is

ORDERED, that portion of the defendants' motion seeking to withdraw their plea due to potential risks of a conflict of interest existing between Gary Gramer's representation of the defendants and Gary Gramer's prior representation of Douglas Cass is hereby DENIED.

Defense counsel further argues that the defendants were induced or coerced to plead guilty by defense counsel, the District Attorney and the Court. Upon review of the transcripts of the pretrial hearing, the trial and the mid-trial plea by the defendants the Court finds the defendants voluntarily acknowledged their guilt. The Court further notes that several plea offers were proffered by the People prior to and during the trial. It was not until several witnesses had been presented by the People that the defendants accepted the offer by the People and pleaded guilty.

It is noted that the transcript of the actual plea itself was not provided to the Court by defense counsel. The People have provided such transcript for review by the Court. The Court finds that the transcript of the plea proceeding unequivocally demonstrates that both the defendants' plea and the waiver of right to appeal was voluntary, knowing and intelligent. Accordingly, it is

ORDERED, that portion of the defendants' motion seeking to withdraw their plea due to undisclosed risks of conflicts and coercion and inducement to plead guilty by defense counsel, the District Attorney and the Court is hereby DENIED.

Defense counsel further seeks the plea be withdrawn on the basis that the People have breached the plea agreement and the Court is unable to carry out the proposed agreement.

Such argument is based upon additional complaints to be filed against the defendants subsequent to the plea agreement. Citing People v. Seilikoff the defendants argue that the new complaint prejudices the defendants, prevents the Court from sentencing the defendant as agreed and was not a part of the original plea agreement, therefore defendants should be permitted to withdraw their pleas. 360 NYS2d 623 (1974)

The defendants' reliance upon Seilikoff is misplaced. The additional complaints and plea offer made by the People consist of conduct occurring after the timeframe included in the instant indictment. Furthermore, a plea on such open complaints will not subject the defendants to second felony offender treatment at sentencing (see, People v. Samms, 710 NYS2d 310 (2000); New York State Penal Law Sec. 70.06(1)(b)(iv). Accordingly, it is

ORDERED, that portion of the defendants' motion seeking to withdraw their plea due to a breach of the plea agreement by the District Attorney's Office and the Court's inability to carry out the proposed agreement is hereby DENIED.

Finally, defense counsel argues the lack of competency and experience of Mr. Gramer as defense counsel to effectively assist defendants in their defense requires the Court to permit the defendants to withdraw their guilty pleas.

Defense counsel's lack of experience or his unsuccessful use of specific trial tactics does not constitute ineffective assistance of counsel (See, People v. Benevento, 674 NYS2d 269 (1998). It is only where the advice of counsel is so fundamentally erroneous as to constitute a deprivation of the defendant's basic rights or where such representation

creates a farce of a trial and a mockery of justice that the Court should set aside the plea (See, People v. Pirone, 224 NYS 85 (N.Y. Co.Ct. 1962)). Accordingly, it is

ORDERED, that portion of the defendants' motion seeking to withdraw their plea due to lack of competency and experience of defense counsel to effectively assist the defendants is hereby DENIED.

Upon the foregoing, it is

ORDERED, that the defendants' motion seeking an order of the Court permitting the defendants to withdraw their plea of guilty entered on the 4" day of April, 2002, is hereby DENIED in its entirety.

The foregoing constitutes the decision and order of this Court.

Dated: Riverhead N.Y. July 15, 2002

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Hon. Joseph Farneti

J.C.C.

APPENDIX E
DECISION AND ORDER OF THE NEW YORK STATE SUPREME COURT,
APPELLATE DIVISION-SECOND DEPARTMENT

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

D0186 O/cf
Argued - June 12, 2003

SANDRA J. FEUERSTEIN, J.P.
GABRIEL M. KRAUSMAN
GLORIA GOLDSTEIN
REINALDO E. RIVERA, JJ

2002-06617
2002-06618 DECISION & ORDER
2002-06621
The People, etc., respondent, v Active Appliance Corp., Reliance, Appliance, Inc., and Lori A. Cass, appellants.

(Ind. No. 1928A-C/2001)

William J. Keahon, P.C., Islandia, N.Y., for appellants.

Thomas J. Spota, District Attorney, Riverhead, N.Y. (Glenn Green of counsel), for respondent.

Appeals by the defendants from three judgments (one as to each defendant) of the County Court, Suffolk County (Farneti, J.), all rendered July 15, 2002, convicting each of the defendants of scheme to defraud in the first degree, upon their pleas of guilty, and imposing sentences.

ORDERED that the judgments are affirmed, and the matter is remitted to the County Court, Suffolk County, for further proceedings pursuant to CPL 460.50(5).

PEOPLE v ACTIVE APPLIANCE, CORP.
PEOPLE v RELIANCE APPLIANCE, INC.
PEOPLE v CASS, LORI A.

Contrary to the defendants' contention, their pleas of guilty were knowingly, voluntarily, and intelligently made *(see People* v Harris, 61 NY2d 9).

The defendants' waivers of the right to appeal precludes review of their contention that they were denied effective assistance of counsel, except to the extent that it affected the voluntariness of their pleas *(see People v Herring, 274* AD2d 525, 526). Contrary to the defendants' contention, their pleas of guilty were not the product of an improper conflict of interest by reason of defense counsel's prior representation of the husband of the defendant Lori Cass in unrelated matters *(see People v Abar,* 99 NY2d *406).* The defendants failed to show that "the conduct of [their] defense was in fact affected by the operation of the conflict of interest, or that the conflict operated on the representation" *(People v Abar, supra).*

Accordingly, the County Court properly denied the defendants' motion to vacate their pleas of guilty.

FEUERSTEIN, J.P., KRAUSMAN, GOLDSTEIN and RIVERA, JJ., concur.

ENTER:

James Edward Pelzer
Clerk

APPENDIX F
ORDER OF THE NEW YORK STATE COURT OF APPEALS

State of New York
Court of Appeals
BEFORE: HON. GEORGE BUNDY SMITH, Associate Judge

CERTIFICATE DENYING LEAVE

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

against

ACTIVE APPLIANCE CORP., RELIANCE APPLIANCE, INC., and LORI A. CASS,

Appellants.

I, GEORGE BUNDY SMITH, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

The stay is vacated.

Dated at Albany , New York
October 20, 2003

Associate Judge

*Order of the Appellate Division, Second Department, entered August 4, 2003, affirming the judgments of the County Court, Suffolk County, all rendered July 15, 2002.

*Description of Order: